

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

IN RE: ETHICON, INC., PELVIC)
REPAIR SYSTEM PRODUCTS LIABILITY) MDL NO.
2:12-md-2327)

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE **HONORABLE CHERYL A. EIFERT**
UNITED STATES MAGISTRATE JUDGE
FRIDAY, MARCH 11, 2016; 1:30 P.M.
HUNTINGTON, WV

Proceedings recorded by mechanical stenography,
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Mary A. Schweinhagen, RDR, CRR
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1 THE JUDICIAL ASSISTANT: Good afternoon. This is
2 Laura, Judge Eifert's judicial assistant, and I would first
3 like to confirm the court reporter today, Mary Schweinhagen,
4 is on the line?

5 THE COURT REPORTER: Yes, Laura, I'm here.

6 THE JUDICIAL ASSISTANT: Who is on the line for
7 plaintiffs' counsel, please?

8 MR. AYLSTOCK: Hi, Laurie. This is Bryan Aylstock
9 on behalf of the plaintiffs.

10 MS. BAGGETT: Renee Baggett also on behalf of the
11 plaintiffs.

12 THE JUDICIAL ASSISTANT: Thank you.

13 MS. FITZPATRICK: Fidelma Fitzpatrick on behalf of
14 the plaintiffs.

15 MR. KEITH: Sean Keith on behalf of the plaintiff,
16 Cherise Springer.

17 THE JUDICIAL ASSISTANT: I am sorry. Would you
18 repeat your last name, please? I didn't quite get that.

19 MR. KEITH: I am sorry. Keith, K-E-I-T-H.

20 THE JUDICIAL ASSISTANT: Someone is shuffling
21 papers or something; it's very hard to hear. I am not sure,
22 but that's what it sounds like anyway, if we could maybe
23 refrain.

24 All right. Continue, plaintiffs' counsel.

25 MS. KOTT: Mikalia Kott on behalf of various

1 plaintiffs.

2 THE JUDICIAL ASSISTANT: Could you repeat your
3 name?

4 MS. KOTT: It's Mikalia, is the first name,
5 M-I-K-A-L-I-A; last name, K-O-T-T.

6 THE JUDICIAL ASSISTANT: Thank you.

7 MR. WOELLNER: And Andrew Woellner for Ms. Wolfe,
8 plaintiffs.

9 THE JUDICIAL ASSISTANT: Andrew, would you please
10 spell your last name?

11 MR. WOELLNER: Certainly. W-O-E-L-L-N-E-R.

12 THE JUDICIAL ASSISTANT: Thank you.

13 MR. BOLING: Mason Boling for various --

14 UNIDENTIFIED: Kimberly Wilson-White on behalf
15 of Joyce Justus.

16 THE JUDICIAL ASSISTANT: I'm sorry. Could Mason
17 repeat your name again, please? I think that's what I
18 heard.

19 MR. BOLING: Yes. Mason Boling, B-O-L-I-N-G, for
20 various plaintiffs.

21 THE JUDICIAL ASSISTANT: All right. Thank you.

22 Is that all --

23 KIMBERLY WILSON: Kimberly Wilson-White on behalf
24 of Joyce Justus.

25 THE JUDICIAL ASSISTANT: I'm sorry. Could you

1 repeat your name, please?

2 MS. WILSON-WHITE: Kimberly Wilson-White.

3 THE JUDICIAL ASSISTANT: All right. Thank you.

4 MS. WILSON-WHITE: On behalf of Joyce Justus.

5 THE JUDICIAL ASSISTANT: All right. Is there
6 anyone else for plaintiffs' counsel?

7 All right. May I please have Ethicon counsel?

8 MS. MODAK-TRURAN: Anita Modak-Truran on behalf of
9 Ethicon and Johnson & Johnson.

10 MR. WATSON: Ben Watson on behalf of Ethicon and
11 Johnson & Johnson.

12 THE JUDICIAL ASSISTANT: All right. If that's
13 everyone, we are here in the case of Ethicon Pelvic Repair
14 Systems Products Liability Litigation, Case Number
15 2:12-md-2327, regarding plaintiffs' emergency motion to
16 reconsider the scope of wave 1 defendants' medical exams.
17 That's ECF number 1912.

18 Please hold one moment for the Judge.

19 THE COURT: Hello.

20 UNIDENTIFIED: Good afternoon, Your Honor.

21 UNIDENTIFIED: Good afternoon, Your Honor.

22 THE COURT: All right. We are here on plaintiffs'
23 emergency motion to reconsider the scope of wave 1 defense
24 medical exams in the wave 1 cases.

25 And I appreciate you all getting your materials to me

1 so quickly. I wanted to do this as soon as possible because
2 I know that there are exams probably being done as we speak
3 right now.

4 So I have read the materials. Let me ask the
5 plaintiffs first if there is anything they would like to
6 highlight or anything they would like to add to what they
7 have written?

8 MR. AYLSTOCK: Good afternoon, Your Honor. Bryan
9 Aylstock on behalf of the plaintiffs. Just a few
10 introductory comments, and I have invited the plaintiffs'
11 attorneys with particular plaintiffs where evidence has been
12 submitted to be on the phone as well to answer any
13 particular questions.

14 But we didn't bring this -- this brief motion for
15 reconsideration lightly, and we recognize and appreciate the
16 Court's prior ruling on the DME progress. It's important to
17 note that we are not seeking to prohibit the defense medical
18 examinations in this motion for reconsideration but rather
19 just a certain portion of this Court's order which disallows
20 audio recordings for the process. And we did that not
21 lightly.

22 To say that the coordination of the DME process has
23 been difficult is a gross understatement, and I know
24 Ms. Modak-Truran's on the phone and I think she'd be in
25 agreement with me on that. It's not a slight on anybody's

1 efforts. In fact, I know that the efforts of defense
2 counsel have been in good faith.

3 However, we've been forced to deal with a number of
4 complaints and tried to smooth over issues in this process,
5 everything from asking a woman in Mississippi to fly all the
6 way to Seattle. I have an 82-year-old client from North
7 Carolina who is with a 52-year-old disabled son forced to
8 fly to New York for a DME. I know there are some doctors
9 that are closer. And then the case of Ms. Justus where she
10 had to travel 400 miles by car each way for her particular
11 examination.

12 None of this -- that's not why we're here, but it does
13 highlight the fact that we've been trying to work through
14 this, but certain things have forced us to bring matters to
15 the Court's attention. And they generally fall in three
16 categories:

17 One relates to very painful, invasive, and, in fact,
18 hurtful and harmful examinations by certain IME physicians
19 in the context of the examination. We've had some issues
20 where women have traveled hundreds and hundreds of miles
21 only to be told that their physician doesn't even know that
22 there is an examination that day and been turned away.

23 And then we've had some, some situations that are
24 highlighted for Your Honor where the physician is making
25 pejorative comments to our clients about the nature of their

1 claims and who's the innocent party and who's the victim
2 here and so forth.

3 But the stroke that broke the camel's back and the
4 reason that we felt compelled to file this motion was really
5 Ms. Freitas and the clients who have complained about the
6 very painful examinations. So far there's only been, I
7 think, about 30 examinations, so there are a lot upcoming.
8 And of those 30, about one third have now had major, major
9 issues.

10 And I -- if the Court would permit, I'd like to concede
11 the floor to Ms. Fitzpatrick who represents Ms. Freitas to
12 kind of go over what happened with her and why we think we
13 need the audio recording.

14 MS. FITZPATRICK: Good afternoon, Your Honor.
15 Thank you for the opportunity to address this issue with
16 you.

17 Monica Freitas is my client. She has been working with
18 us closely on her case and been trying to cooperate with
19 everything that has been going on here. And she was taken
20 for a defense medical examination; she had to go from Los
21 Angeles to Denver, which was extraordinary difficult for
22 her, but in light of the Court's order she complied with
23 going to Denver instead of finding a defense medical
24 examiner who was closer to her home and would help out more
25 with her scheduling issues, particularly with her children.

1 And she was -- and I know this personally -- very
2 nervous and very apprehensive about the exam. She was
3 worried about it. And she called us as soon as she got out
4 of the examination room. And I can tell you, she was
5 hysterical. She was literally beside herself, sobbing,
6 hysterically upset, in an extreme amount of pain. She was
7 bleeding vaginally. She was cramping. And she quite
8 honestly, Your Honor, had felt completely violated by what
9 had happened to her in the exam room.

10 We set that forth in an affidavit. I don't think I
11 need to go through all of the ins and outs of it, but
12 perhaps one of the most disturbing things to her was when
13 she told Dr. Flynn how painful the exam was, how difficult
14 it was for her, and he told her that she had to go through
15 with the exam; that she was required to do it; and that if
16 she didn't go through with the exam, he implied that there
17 would be adverse consequences to her legal action.

18 And so she felt completely intimidated. She felt
19 completely alone and intimidated in that room. She had felt
20 she had no one to speak for her or to comfort her or to help
21 her through that process.

22 And it was -- it was a very disturbing thing to receive
23 that phone call. And it was also very disturbing as a
24 plaintiff's attorney to feel that we hadn't done enough to
25 protect her or that there was something going on that --

1 that we put our clients in this position.

2 And so not only did she have -- you know, she was then
3 miles and miles away from home. She had to get herself out
4 to the Denver airport; she had to get herself home. And by
5 the time she landed in California, she was still having
6 extreme vaginal pain, cramping, bleeding.

7 Dr. Flynn told her that the bleeding couldn't be on
8 account of his exam, that it must be that she was having her
9 period. And no matter how she stressed that she wasn't on
10 her period, she knew she wasn't on her period, he wasn't
11 willing to consider anything else and he left her there. He
12 left her in the examining room. He left her there by
13 herself.

14 And so by the time she got back to California, she did
15 go to an Urgent Care facility and has been prescribed
16 medication, both muscle relaxants as well as pain reliever
17 because of the pain that she was having. And she also later
18 had a fainting episode as a result of this. So it was a
19 pretty egregious exam.

20 We have other clients who've -- who've been
21 inconvenienced, have had problems, things haven't gone
22 smoothly, but Mrs. Freitas was a really extreme case of what
23 has happened and has raised the issue certainly for us again
24 about requiring these women to go alone into these exams
25 that are so invasive and to be there without someone to

1 advocate for them, comfort them in case something like this
2 happens, to do whatever needs to be done.

3 And now we have a situation with Mrs. Freitas that her
4 version of what happened is going to be a he said/she said
5 of what happens in that room, of what Dr. Flynn said to her
6 or didn't say to her. It's just extremely disturbing on a
7 personal level, but it's also disturbing on a -- you know,
8 as an advocate, as someone who is going to be trying
9 Ms. Freitas' case, the implications of what this -- this
10 incident raises for this litigation.

11 THE COURT: All right. Who would like to speak
12 then on behalf of the defendant?

13 MS. MODAK-TRURAN: Your Honor, Anita Modak-Truran,
14 and I will speak on behalf of the defendants.

15 I will tell you that everything this Court has just
16 heard, as well as the papers filed by the plaintiffs,
17 demonstrates again the wisdom of this Court's prior orders
18 that there not be audio recordings and there not be some
19 third party selected by the plaintiffs because it will only
20 increase the adversarial process.

21 All of our physicians that have been retained by
22 Ethicon and Johnson & Johnson to conduct the IMEs have at
23 all times acted professionally and courteously in their
24 dealings with them. And I find that while Ms. Freitas has
25 her version of the events, Dr. Flynn has prepared a

1 declaration. He has reviewed this order. And let me just
2 go through a little bit about what Dr. Flynn says about it
3 and why it goes to the wisdom of this Court's prior ruling.

4 Because if we add audio and other things, we will be
5 compounding what is a very difficult situation with
6 examining room litigation. And that's exactly where we're
7 at right now. When Dr. Flynn -- first of all, he is a
8 urologist. He specializes in female pelvic medicine and
9 reconstructive surgery. He is the co-director of the female
10 pelvic medicine and reconstructive surgery group. He's an
11 associate professor of surgery and urology at the University
12 of Colorado in Denver. He attended medical school at
13 Temple. He did further training in Pennsylvania. He is
14 licensed to practice law. He is a diplomate of the American
15 Board of Urology. He is an impeccably qualified physician.

16 And to have this type of accusations upon him, we
17 think, is designed to have a chilling effect on our experts.
18 Because, can you imagine, he was completely surprised when
19 we had to turn around in a very -- as we understood it, the
20 Court wanted to do the hearing on an emergency basis because
21 of upcoming IMEs, but we had to forward him that. We had to
22 say, we need you to tell us what happened.

23 Now, the good news is Dr. Flynn is never alone in an
24 examining room with a patient. None of our experts are.
25 There is always an independent witness there, somebody -- a

1 female assistant to make sure that when this comes up, that
2 we can be able to discharge these type of accusations.

3 He says in his declaration, which he veri -- which he
4 states under oath is true and correct, that he did examine
5 Ms. Freitas on February 24th, 2016; that he established with
6 her the expectations of the IME; and that there would not be
7 a doctor/patient relationship that would be established.

8 Ms. Freitas elected to travel to the IME alone.
9 Nothing prohibited her from bringing a companion. There was
10 no medical necessity reason for her -- for Ethicon to pay
11 for them, but she certainly could have brought family and
12 friends as other people have done on other IMEs.

13 He told her that the IME would be similar to the one
14 that was performed by the plaintiffs' expert, Dr. Margolis.
15 He gave her expectation. The IME only took an hour. Most
16 of the time was spent taking down her history, and she did
17 mention that she was having cramps and pelvic pain. That's
18 in his -- that's in his declaration.

19 He did the examination, and he said that he has his
20 assistant who was there in the room at the entire time. He
21 explained to her during the entire -- and we're not talking
22 about a pelvic examination. This is not some sort of
23 invasive procedure. It is a normal, routine procedure that
24 women undergo all the time when they want to take care of
25 their gynecologic health.

1 He gave her the option to defer the examination, but he
2 did tell her that if she stopped, then he would write in his
3 report that she stopped. There is nothing intimidating
4 about that. That is a fact.

5 She did cry during the examination; he says that, and
6 he gave her a tissue. When she had regained her composure
7 five minutes later, the medical assistant offered to comfort
8 her by holding her hand, and she declined that.

9 He continued on with the examination, and he used the
10 smaller speculum, which he --

11 When the exam was done, Ms. Freitas asked him
12 questions. He did not give a bimanual exam because she said
13 she was uncomfortable with that, and the doctor did not
14 think that this was a critical part of her exam and he did
15 not do that.

16 Ms. Freitas asked him if -- what was the cause of the
17 pain, was it her mesh, and he responded that it was not part
18 of the IME for him to reveal to her the physical exam
19 findings or share the opinion. We all know here on this
20 call that that will be in the report and that whatever notes
21 he has will be disclosed to the other side.

22 Ms. Freitas, after she was dressed, the doctor came
23 back out. He sat next to her. He asked her politely if she
24 wanted to use the restroom. She did. She -- he told her
25 that the IME was complete, that she was free to leave. He

1 walked out with her to the waiting area. There was a cab,
2 and she left.

3 When she left the examination room, there was no
4 crying. She was composed. There was no signs of bleeding.
5 And she did not appear in distress. She had -- he had no
6 other patients that day, and he said he did not feel that he
7 rushed her.

8 He's been practicing medicine for 14 years. He's
9 performed over 1,000 pelvic exams, and he makes every effort
10 to be as thorough, careful, and gentle as possible.

11 He says that under rare circumstances there are -- can
12 be a need to perform an exam under anesthesia, and that
13 would be where there is children or patients with physical
14 or mental disabilities or fistulas; but he determined that
15 the fact that Mrs. Freitas had other providers that had
16 performed pelvic examination without an anesthesia, that
17 Dr. Margolis was able to perform a pelvic exam without
18 anesthesia, he made a medical judgment that anesthesia was
19 not indicated for her.

20 And that's just one of the cases.

21 All of our doctors that were still in the country, we
22 have declarations for. I think there was one doctor that
23 was out of the country, but we provided his report.

24 I agree with Mr. Aylstock that his process of going
25 through the IMEs has been challenging. I think certainly

1 that with the Aylstock firm and with the Cart -- Cartmell
2 firm, the parties have been working very hard to work
3 through different obstacles.

4 For example, one of the plaintiffs here -- and I know
5 because some of this I am personally involved with -- was a
6 lady who decided that she wanted to go 400 miles in a car
7 instead of flying. And, you know, I didn't really
8 understand why she would prefer to take a long car ride
9 rather than fly, but it was explained to me by her lawyer
10 that that's the way she wanted to do it. We made
11 arrangements to have a limo service pick up her up at her
12 home and take her to the examination. Because it was a car
13 service, we said, you know, if you want to bring a
14 companion, go ahead and bring a companion; you are going to
15 be in the car.

16 What we later found out in this situation -- and this
17 part is very, very troubling to us, because while we thought
18 everybody has tried to work within Court's orders for the
19 IMEs to work under very challenging deadlines -- this
20 particular plaintiff had with her a letter from her
21 plaintiff's attorney which actually was telling her what to
22 say during the examination, to make sure that she took
23 frequent bathroom breaks on the car ride, and that she
24 should go to the medical examination and tell the doctor
25 that she wanted to audio record it and that she wanted to

1 have her companion there.

2 And what our declaration shows that's attached in our
3 opposition is that when this particular plaintiff goes to
4 see the doctor, she provides this letter to -- to the intake
5 people and that goes in her chart. And our doctor who's
6 performing the IME, who does not want to be in an
7 adversarial situation -- our -- our experts are working
8 professionals who do pelvic examinations all the time, and
9 the next thing you know, she has in her file this letter
10 saying that, you know, she's got to do this and do that and
11 the plaintiff is going to tell her certain things about
12 where she has her pain and her other history.

13 And so what she does is she does the proper things.
14 She called Kelly Crawford, who is the defense counsel on
15 that particular case, and decides what to do. And
16 Ms. Crawford sends her a copy of this Court's order, which
17 is pretty clear that there is no audio and there is nobody
18 present.

19 And when we raised this, we didn't come running to the
20 Court with this issue, Your Honor. What we did is we went
21 to -- we reached out to the leadership and said can you
22 please communicate with all members of your team that Judge
23 Eifert has ruled in this way, and we are trying to follow
24 her orders, and we are trying to reduce the adversarial
25 process under these challenging circumstances. And the

1 response we got was this motion. The response was this
2 motion.

3 Your Honor, I know that you've read the papers, but I
4 want to be very clear about this. We believe that our
5 physicians, who are the best in their field, have acted
6 professionally at all times. They have been courteous.
7 There have been scheduling difficulties; we admit that. But
8 that is not the doctor's fault.

9 There is one doctor where a number was left off, and it
10 is unfortunate. And I take full responsibility that there
11 was a mistake made like that. It should not have been made.
12 I understand that if I -- if it was me and I was trying to
13 get to an IME and I didn't have the right address and I was
14 trying to be timely, I would be shaken up by that. And we
15 have tried to do everything we can to make sure that that
16 never, ever happens again. It should never have happened.

17 But the relief that the plaintiffs are seeking in this
18 case, the one to add audio recordings and to add another
19 person in that room, is not going to have the desired effect
20 of making this litigation any easier. It's simply going to
21 escalate the adversarial process. And I would respectfully
22 request that this Court stand by its original orders and
23 deny this motion for reconsideration.

24 MS. FITZPATRICK: Your Honor --

25 MR. AYLSTOCK: Your Honor -- I'm sorry.

1 MS. FITZPATRICK: No. I just wanted to address
2 one thing, Bryan, before you took up the more global issue.
3 On behalf --

4 (Court reporter interrupts.)

5 MS. FITZPATRICK: -- of Mrs. Freitas. This is
6 Fidelma Fitzpatrick; I'm Miss Freitas' lawyer.

7 I'll be honest. I take exception to what was just said
8 by Ethicon because the implication appears to be that
9 Mrs. Freitas has misrepresented or made an affirmative
10 misrepresentation to this Court in this time-sworn affidavit
11 that she signed. That is absolutely, completely, and
12 totally unfounded and untrue.

13 And I would note, Your Honor, this is precisely what
14 the problem is, and that there is right now differing
15 opinions and different factual recitations of what happened
16 in that exam room at that time.

17 I'd also note that the doctor had someone in there who
18 has a (phone beep) ally, whatever we want to call it, (phone
19 beep) was there alone. And I think that the patent
20 unfairness of that position is pretty clear from the record
21 here.

22 But I take great exception. I don't think that this is
23 designed to -- to hash out the details, but I take great
24 exception to the fact that Ethicon -- how Ethicon is
25 representing my client and her truthfulness on this call,

1 and, I would say, quite shocked by it, and I do believe that
2 it underscores every reasons why my clients have a right to
3 have someone to advocate for them and to be their witness to
4 what happens in those exam rooms.

5 THE COURT: All right. Well, let me -- let me say
6 this. I have not changed my mind about recordings. I don't
7 think that having an audio recording will help at all with
8 what you perceive to be problems in these visits. I don't
9 think an audio recording of a vaginal examination is going
10 to be helpful. I think it would be too confusing. It could
11 be easily distorted. I don't think anybody will really
12 understand any better what's going on in the examination
13 room by listening to an examination of a vaginal
14 examination. So I'm not going to allow an audio recording.
15 I don't think that would be helpful at all. I don't -- I
16 can't see that.

17 The next issue then would be the organization or
18 disorganization, and, Ms. Truran, you are going to have to
19 do something about that. These people are traveling too far
20 to show up at addresses that are not correct addresses and
21 show up and have the doctor not know that there is -- that
22 they are supposed to be there or to have someone at the
23 front desk who doesn't know there is an IME scheduled. I
24 mean, there's that -- those things have got to be worked
25 out.

1 And there is -- you know, maybe these are the only -- I
2 think there were 3 or 4 of those situations listed out of
3 the 10 that were given to me. That's, you know, 30 percent
4 of the 10 they gave me. That's way too many. Maybe out of
5 the 30 that were done, it was only those 3 or 4, but even
6 still, when you've got somebody who's traveling as far as
7 these women are traveling, there shouldn't be errors like
8 that. So I could see, you know, maybe 1 out of 100, but not
9 3 or 4 or 5 out of 30. That's too high of an error rate.

10 So you need to get on your people that are doing the
11 scheduling, and somebody needs to be very conscientious
12 about making sure that everybody is on the same page.

13 Also, I think we talked about the fact that I -- I
14 really wanted the defense to try to coordinate the IMEs so
15 the women wouldn't have to travel halfway across the
16 country, if there was some way that they could go somewhere
17 closer. Maybe you are trying to do that and you just
18 haven't been able to do it in certain circumstances. I can
19 understand that. But I think the organization needs to get
20 a little bit more attention. So I would appreciate it if
21 you would do that.

22 But, again, you know, an audio recording in the
23 examination isn't going to help solve that problem for
24 you -- for the plaintiffs.

25 MS. FITZPATRICK: Your Honor, I --

1 MR. AYLSTOCK: Your Honor --

2 MS. FITZPATRICK: Go ahead, Bryan. I'm sorry.

3 MR. AYLSTOCK: I hate to interrupt, Your Honor.

4 This is Bryan Aylstock on behalf of the plaintiffs. On the
5 recording audio issue in particular, one of the things we
6 brought out, and, in fact, defense brought it out in their
7 response, is that nearly an hour is being spent picking and
8 then reciting and then in some cases in a scowling manner
9 cross-examining our women about things that clearly were in
10 their deposition and so forth.

11 And I do think there is an effort to circumvent the
12 time limitations of PT0 205, and I hear what you are saying
13 about what the recording of a vaginal exam is really going
14 to say.

15 But in the case of Miss Freitas, as well as Miss Ruiz,
16 who also went to Dr. Flynn, when she jumps off the table in
17 pain or something like that, it would capture that, but it
18 would also capture this effort to -- to cross-examine our
19 plaintiffs.

20 And, finally, the other thing I'd say is these
21 physicians, okay, they have credentials. We all have
22 physicians with credentials. Dr. Flynn's been a KOL for
23 Ethicon for years. He's been a consultant. He is -- it is
24 an adversarial proceeding. It just is.

25 These are paid consultants. They have been paid vast

1 sums of money over and over and over again. In a lot of
2 cases they've been in direct communication with Ethicon
3 personnel for years and years and years to influence
4 behavior of other physicians.

5 So I don't think it's fair to characterize them as
6 somehow holier than thou or -- and they are certainly not a
7 court-appointed expert. It's a very different situation,
8 and if special circumstance aren't warranted here for audio
9 recording under the case law, I don't know what would be
10 considered special circumstances.

11 THE COURT: Well, the case law does not support
12 you at all. I've gone through the case law, and I went
13 through it again today, Mr. Aylstock, and the case law does
14 not support your position.

15 So what you're talking about is just run-of-the-mill
16 stuff. And the federal courts have almost -- well, the
17 majority. I won't say uniformly. There have been a few odd
18 cases here and there like the one that was cited in your
19 reply memorandum from 1984, but most federal courts have
20 found that this so-called cross-examination by the
21 interviewing physician is just not a compelling or special
22 or good-cause reason to audiotape or record in any way an
23 IME.

24 Because there are plenty of ways for a plaintiffs'
25 attorney to rectify what they may perceive as the

1 cross-examination. They are going to get the report. They
2 are going to get the report in advance of any trial. They
3 have their own client's medical records and history. They
4 have their own IME. They have their own experts.

5 So if there is some glaring piece of history or
6 statement in this physician's IME report that stands out and
7 is inconsistent with everything else in the record, then I'm
8 sure the plaintiff's attorney can point that out and
9 certainly undermine the credibility of the physician who
10 conducted the IME for the defendant.

11 So I'm not really -- that's not compelling to me. I
12 think having it recorded is not the way that a typical
13 examination is done. It's not the way any of the
14 plaintiffs' IMEs or any of the plaintiffs' examinations have
15 been done. And it's not at this point an equal playing
16 field to have all of the defendants' examinations recorded
17 and none of the plaintiffs' examinations recorded. So we're
18 not going to do that. I don't see any compelling reason to
19 do it.

20 The main problem here I think that might be disturbing
21 is that if there are -- if there is mistreatment occurring
22 in the examinations. That would be concerning to me.
23 However, I don't think audio recordings are going to really
24 uncover that because you are not going to be able to tell
25 what's going on, number one; and they can be distorted.

1 You know, I'm not saying the doctors are holier than
2 thou, but I also am not going to say the plaintiffs are
3 holier than thou. We both know there are true believers on
4 both sides of the V here.

5 So, you know, I've read enough in these blogs to know
6 that there are plaintiffs out there that are vilifying the
7 attorneys in this case. So, you know, I'm not -- I'm not --
8 I'm not naive enough to think that every doctor is gentle
9 and I am not naive enough to think that every plaintiff is
10 just sweet and kind and has no hidden agenda.

11 So, you know, I don't think we can assume -- and,
12 unfortunately, because we're not viewing, we can't deal with
13 this on a case-by-case basis. I'm having to do what is
14 basically a blanket order. So I am not going to order as a
15 blanket matter that there be audio recordings, and I am not
16 seeing anything that makes me think it would be helpful. So
17 that is out of the picture for me.

18 What I do want to talk a little bit more about is the
19 third party in the room, what has been brought up in this
20 wave 1 situation. I have said there is to be no plaintiff's
21 lawyer, there is to be no representative of a plaintiff's
22 lawyer, no employee of a plaintiff's lawyer, no nurse hired
23 by a plaintiff's lawyer, no consultant; nobody like that
24 should be present during the examination. I've said that in
25 Boston Scientific, I've said that in Lewis, and I still

1 stand by that. I firmly do not believe that anyone
2 representing the plaintiffs' counsel in any way should be
3 present at the examination.

4 I've also said, though, in Boston Scientific, if you've
5 got a plaintiff who has a mental or physical disability, who
6 has a caretaker, who's elderly and typically has somebody
7 accompany them into their examinations, then they should be
8 allowed to have that person accompany them into their
9 examinations. I am not going to change their normal,
10 customary routine for when they get their doctors'
11 examinations.

12 So the question in my mind is, is there some area in
13 between there where you have a woman who may not have, per
14 se, a mental or physical disability but for some reason is
15 so terrified that they want to have a family member
16 accompany them, and should that family member be allowed to
17 stand there during the examination. So that is -- that's
18 where my mind is right now.

19 What I'd like to hear, I'd like to hear from both sides
20 on that point. What is the position -- I know what the
21 position of the plaintiff would be is, yes, that person
22 ought to be able to be there and present through the whole
23 thing. But if you want to say anything else on that, I'm
24 going to give you the opportunity.

25 Then I'd like to hear from Ethicon about its position

1 on whether these women ought to be allowed to have a family
2 member, not only -- I agree with Ms. Truran. They have
3 never said that these people can't take family members with
4 them, ride with them, sit with them in the waiting room.
5 Ethicon shouldn't have to pay for that. But they certainly
6 haven't been precluded from taking somebody with them on the
7 trip if they want to, and pay the expenses.

8 The question is, if they take someone, a family member
9 I'm talking about, with them, should that person be allowed
10 to go into the examining room. Now, you know, I think in
11 part it should depend on the physician and whether that's
12 something the physician allows or doesn't allow. But I also
13 want to hear what the parties have to say about that.

14 So let me start with the plaintiffs.

15 MR. AYLSTOCK: Your Honor, Bryan Aylstock on
16 behalf of the plaintiffs. We did actually submit some sworn
17 testimony from one of the DME doctors that's performing
18 these examinations, Dr. Kenton, on that very point. And I
19 will venture to say that virtually any doctor, OB/GYN, is
20 going to allow a husband or a next friend to be in the
21 examination room. I've certainly done that with my wife
22 without any objection whatsoever on occasion.

23 And one of the things that Ms. Modak-Truran said just
24 now or a few minutes ago makes it even more important. In
25 the context of what happened with Miss Freitas, as well as

1 what happened with Miss Ruiz, Miss Springer, Miss Justus,
2 Miss Bennett, where there was this extremely painful exam,
3 of course the doctor's going to say they didn't do anything
4 wrong. And the doctor has the advantage of having
5 his employee, also being paid by Ethicon in the case of the
6 DMEs, directly or indirectly, to back him or her up on
7 whatever is said in that examination room.

8 So I certainly believe that we're going to have a he
9 said/she said. One side shouldn't have the advantage of
10 some third party without the benefit of another third party,
11 particularly here when we are talking about very personal,
12 invasive exams that can be very painful, and where it's the
13 practice of Ethicon's own expert to perform these to allow
14 whoever the plaintiff wants -- and I hear what you are
15 saying, certainly not a lawyer or a representative of the
16 lawyer, but a friend of the plaintiff -- to be there during
17 this very traumatic experience.

18 THE COURT: Well, before you -- before you --
19 before Ethicon talks, let me say this. Two points on that I
20 want to make, Mr. Aylstock.

21 As far as the -- as far as it being painful. You know,
22 a doctor doing this kind of examination doesn't know ahead
23 of time whether it's going to be painful or not. And I
24 think as a woman, I know that from time to time those kinds
25 of examinations can be discomforting. They can be slightly

1 painful. And the doctor doesn't necessarily know ahead of
2 time. So I don't think you should get too angry at the
3 doctor if the -- if the doctor caused your client some pain.
4 As long as when the client -- as long as the doctor stops
5 when the client complains of pain, then that's all the
6 doctor can do. I mean, sometimes these examinations do
7 cause discomfort. That's the way that they are, number one.

8 Number two, you know, the reason that the doctor has
9 the nurse in there is that that is the standard of practice.
10 It may even be the law in some states that they have to have
11 somebody else standing there. So I don't know that that's
12 necessarily a fair comparison. I don't think the doctor has
13 the person in there just so they have some extra person in
14 there to say that whatever they have done is correct or
15 right or to lie for them.

16 I think that's just the standard; they always have that
17 extra person in there with them. And maybe that's, you
18 know, from like 100 years ago when you just -- those kind of
19 examinations, they didn't want to -- didn't want to have a
20 man and a -- doing that kind of examination on a woman
21 without another woman in the room. I don't know.

22 But it's a little bit different than what we are
23 talking about now. The one thing I don't want to interject
24 into this is I don't want it to become just a sideshow of
25 evidence, you know, where two people are saying one thing

1 and two people are saying another.

2 So let me hear from Ethicon.

3 MS. MODAK-TRURAN: Your Honor, on behalf of
4 Ethicon. You know, I understand that if somebody is
5 traveling and they want to have a companion in the
6 examination room, and I, you know, I would imagine that all
7 of our IME doctors would be okay with that. In fact, there
8 was one instance where one of the plaintiffs wanted to have
9 her husband present in the room, and he was in the room. So
10 I don't think that's an issue for us. Especially if it
11 relieves somebody's discomfort in traveling.

12 We do the best we can to schedule these IMEs with
13 doctors who are experts in the case who have the expertise
14 in the product at issue.

15 The real issue is I don't think it's fair for Ethicon
16 to have to pay for a companion, a family member, to be there
17 unless that person is -- it's a medical necessity for them.
18 But if it's a matter of somebody traveling and, you know,
19 they have their daughter with them and gave them a level of
20 comfort, yes, I say that is perfectly acceptable. I mean,
21 I've run it -- I'm going to say, yes, our doctors can
22 accommodate that.

23 THE COURT: All right. Then I think that settles
24 that. I think that I agree with Ms. Truran, that Ethicon
25 should not have to pay the cost of that traveling companion.

1 I do think that then if the plaintiff wants to take a
2 family member or a very close friend -- but you,
3 Mr. Aylstock, I'm going to rely on you and Ms. Fitzpatrick
4 to make it clear to your colleagues it is -- that that
5 person is not to be a plaintiff's lawyer, a paralegal from a
6 plaintiff's office, a secretary, a paid consultant, a nurse,
7 anybody at all who is in any way connected with the
8 litigation from the representation side of it, if you
9 understand what I mean. If it's a spouse, a family member
10 of the plaintiff, a close friend, but nobody, nobody else.
11 Do you hear what I'm saying?

12 MR. AYLSTOCK: I do, Your Honor. This is Bryan
13 Aylstock.

14 MS. FITZPATRICK: Yes, Your Honor. Fidelma
15 Fitzpatrick.

16 THE COURT: I think that most doctors will be okay
17 with that. I mean, I don't know why they wouldn't be. You
18 know, I don't know why -- I don't know why most women would
19 want somebody else in the room, but maybe they do.

20 UNIDENTIFIED: I would never want my husband in
21 the room if I was having that done but --

22 THE COURT: I wouldn't either. I wouldn't want
23 anybody in the room, I mean.

24 UNIDENTIFIED: I know. I --

25 UNIDENTIFIED: No, sorry.

1 UNIDENTIFIED: -- for the other side that would
2 like to have someone with her, but I don't think that
3 matters right now.

4 THE COURT: So that's the way we'll do that then.
5 We still -- we will not -- I am not allowing any recordings,
6 but if the plaintiff wishes to take somebody in their family
7 or a close personal friend with them and wants for some
8 reason to have that person in the examining room -- but now
9 that person is just to stand there and comfort, not to
10 interject themselves in any way into the examination, of
11 course -- then that will be fine.

12 Is there anything else on this motion?

13 MR. AYLSTOCK: No, Your Honor.

14 MS. MODAK-TRURAN: Your Honor, the only other --

15 MR. AYLSTOCK: Sorry.

16 MS. MODAK-TRURAN: Bryan, do you mind if I just
17 finish this thought?

18 THE COURT: Sure. Go ahead.

19 MS. MODAK-TRURAN: Your Honor did mention --

20 (Court reporter interrupts.)

21 MS. MODAK-TRURAN: Anita Modak-Truran. And what I
22 was going to address is the Court pointed out that we've had
23 logistical problems and that falls on Ethicon, and we are in
24 complete agreement that that should not happen. We have put
25 measures in place to make sure that there is better

1 communication with the IMEs. The doctors know that there is
2 the IMEs, but one area that we needed to do a better job was
3 to make sure that there is communication with the doctor's
4 staff that there is an IME, and that is under way, that we
5 are doing a better job on that. We are confirming
6 addresses. So I am hoping, Your Honor, we never have this
7 problem ever come back to you. We are doing our best to
8 rectify that.

9 THE COURT: That's good news.

10 Let me ask you all, while I have you on the phone,
11 you're probably not the right people, but I'm going to take
12 a stab at it.

13 I have two other motions that are pending, and I don't
14 even know if these are wave 1 cases, but they have to do
15 with PT0 205 and PT0 190, I think. Are any of you who are
16 on the phone involved in either one of these motions?

17 MR. WATSON: Your Honor, this is Ben Watson for
18 Ethicon. I believe you are talking about the motion for
19 protective order on PT0 205, about filing confidential
20 documents under seal. If so, then, yes, Your Honor, I can,
21 I can -- I can speak to that.

22 THE COURT: Okay. Really all I wanted to know
23 about that is it looks like we're going to need to set up
24 some kind of telephone call or some sort of process, and I
25 didn't know what you were all doing on that.

1 I was going to have Laura send out an email and was
2 (phone beep) who should get the email, and maybe you can
3 tell me, it would be who, you and?

4 MR. WATSON: Your Honor, I and --

5 MR. AYLSTOCK: Bryan Aylstock on behalf of the
6 plaintiffs. We have not yet responded to that. I did just
7 try to talk directly to Mr. Watson, but I did send you an
8 email before you filed that motion, sort of laying out our
9 position, and I think you said you didn't get it, but I'll
10 resend it to you.

11 But we're not yet -- we have not yet responded to that
12 motion, but I will probably be one of the ones involved in
13 the argument, if it gets that far.

14 MR. WATSON: And this is Ben Watson. Bryan, thank
15 you. No, I don't recall receiving the email. If you can
16 resend it, that would be great.

17 MR. AYLSTOCK: Okay. I'll do it right now.

18 MR. WATSON: Thank you.

19 THE COURT: Before we cut you off, with you,
20 Mr. Aylstock, and you, Mr. Watson, if either one or both of
21 you could send Laura just an email giving a summary of
22 the -- does this need to be expedited? Are you going to go
23 on a regular briefing schedule? Do you think you will need
24 a hearing? Just give us some idea of what your thinking is
25 on this particular motion so we know how to plan for it.

1 That would be very helpful.

2 MR. AYLSTOCK: Yes, Your Honor.

3 MR. WATSON: Yes, Your Honor.

4 THE COURT: And the other one, 190, has to do with
5 Ethicon not paying its half of the storage fee. Does any --

6 MS. MODAK-TRURAN: Your Honor, this is Anita
7 Modak-Truran, and I have been aware, made aware of that
8 issue. I know there is -- that issue is pending in the
9 *Carpenter* case, and I have spoken to Andy Snowden, who is
10 our person on that. We do need to pay that. That is the
11 agreement. It fell through the cracks. It shouldn't have.
12 But we do -- we do owe half on that case, of the storage
13 fee.

14 THE COURT: All right. It look like --

15 MS. MODAK-TRURAN: We checked.

16 THE COURT: Yes. It looks like there is several
17 cases. So if somebody could check into that, maybe that's a
18 motion that can wind up -- those motions can be withdrawn at
19 some point. So if somebody would follow up with that and
20 just let me know at some point what's going on with that,
21 I'd appreciate it.

22 MS. MODAK-TRURAN: Your Honor, on behalf of
23 Ethicon, Anita Modak-Truran, I can do that.

24 THE COURT: All right. I appreciate that. Thank
25 you.

1 UNIDENTIFIED: The only other issue related to
2 sort of this IME processing, and I hope it's been worked
3 out, but in certain circumstances, Ms. Modak-Truran, you are
4 insisting on 1099s and tax information be provided by the
5 plaintiffs, and, you know, that creates all sorts of tax
6 issues and -- potentially when that really shouldn't, for
7 reimbursement, I mean. And I think you have changed that,
8 but maybe if you could spread the word on that, that would
9 be helpful.

10 MS. MODAK-TRURAN: All right. I will check into
11 that. Nobody actually told me that we were asking for 1099s
12 for reimbursement, so let me check into that issue.

13 UNIDENTIFIED: Thank you.

14 THE COURT: All right. Does that cover it?

15 MR. AYLSTOCK: I think so, Your Honor.

16 THE COURT: All right. Thank you all very much.

17 MR. AYLSTOCK: Thank you, Judge.

18 MS. MODAK-TRURAN: Thank you, Your Honor.

19 (Proceedings concluded at 2:19 p.m.)
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1 CERTIFICATE OF REPORTER

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3 I, Mary A. Schweinhagen, Federal Official Realtime
4 Court Reporter, in and for the United States District Court
5 for the Southern District of West Virginia, do hereby
6 certify that pursuant to Section 753, Title 28, United
7 States Code that the foregoing is a true and correct
8 transcript of the stenographically reported proceedings held
9 in the above-entitled matter and that the transcript page
10 format is in conformance with the regulations of the
11 Judicial Conference of the United States.

12
13 s/Mary A. Schweinhagen

14 _____ March 18, 2016

15 MARY A. SCHWEINHAGEN, RDR, CRR
16 FEDERAL OFFICIAL COURT REPORTER
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